No. 17-_____

In The
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Indiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners are Tyson Timbs and his 2012 Land Rover LR2. Respondent is the State of Indiana. Additional plaintiffs before the trial court were the J.E.A.N. Team Drug Task Force, the Marion Police Department, and the Grant County Sheriff's Department.

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INTRODUCTION

This case presents an unsettled question of national importance: whether the Excessive Fines Clause of the Eighth Amendment is incorporated against the States. Although the majority of state and federal courts to consider this question have applied the Clause to the States, a growing minority of state courts have chosen not to. The Indiana Supreme Court in this case aligned itself with that minority view, relying on a sentence of "dicta" from *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), while acknowledging an open break with other jurisdictions. *See* App. 8-9. Unless and until this Court "authoritatively" holds that the Excessive Fines Clause is incorporated against the States, the Indiana Supreme Court announced that it would "decline to find or assume incorporation"—or even engage with the incorporation analysis. App. 8.

The Indiana Supreme Court's decision deepens a growing divide on the question presented. Although two Circuits and at least 14 state high courts apply the Excessive Fines Clause to the States, a minority of courts—in Montana, Mississippi, Michigan, and now Indiana—believe that the Clause does not apply. And despite their "coordinate responsibility" to give effect to federally protected rights, *Howlett* v. *Rose*, 496 U.S. 356, 367 (1990), each of these jurisdictions has written off the Excessive Fines Clause without evaluating this Court's incorporation precedent. As a result, Petitioner Tyson Timbs—along with the 6.6 million residents of Indiana and more than 13 million residents of the three other minority jurisdictions—enjoys Eighth

Amendment protection against fines and forfeitures imposed by the federal government but not against those imposed by state and local authorities. *See generally Austin* v. *United States*, 509 U.S. 602, 621-22 (1993) (holding that the Excessive Fines Clause applies to civil forfeitures imposed by the federal government).

Beyond exacerbating a split of authority, the Indiana Supreme Court's decision also breaks with this Court's precedent. The Eighth Amendment embodies three "parallel limitations" on the government's power to punish: the Cruel and Unusual Punishments Clause, the Excessive Bail Clause, and the Excessive Fines Clause. *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 263 (1989) (quoting *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977)). Together, these Clauses operate to secure a single, fundamental right to be free from excessive punishments. For that reason, this Court has repeatedly observed that the three Clauses are incorporated in equal measure against the States. *See, e.g.*, *Hall* v. *Florida*, 134 S. Ct. 1986, 1992 (2014); *Cooper Indus.* v. *Leatherman Tool Grp.*, 532 U.S. 424, 433-34 (2001); *Thompson* v. *Oklahoma*, 487 U.S. 815, 819 n.1 (1988) (plurality opinion). And by any measure, the Excessive Fines Clause is deeply rooted in our nation's legal tradition, making it an obvious candidate for incorporation.

Moreover, the question presented is especially pressing today. As disagreement among courts has deepened, fines and forfeitures have exploded at the state and local levels. Civil forfeiture in particular—

the basis for this case—is now "widespread and highly profitable," causing "egregious and well-chronicled abuses." *Leonard* v. *Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari). State and local governments "have strong incentives to pursue forfeiture" in part because "many States permit 100 percent of forfeiture proceeds to flow directly to law enforcement." *Id.* Additionally, prosecutors enjoy procedural advantages in civil-forfeiture cases—for example, no criminal conviction is needed, the standard of proof is lower than in criminal cases, and property owners have no right to appointed counsel. And in Indiana, prosecutors sometimes have a *personal* financial stake in civil forfeiture because in many cases—including this one—the government farms out forfeiture prosecutions to private lawyers on a contingency-fee basis. The impulse to use economic sanctions "for raising revenue in unfair ways" could hardly be stronger. *See Browning-Ferris Indus.*, 492 U.S. at 272.

This Court has recognized that the Excessive Fines Clause is an essential check on the government's tendency to "use[ ] the civil courts to extract large payments or forfeitures for the purpose of raising revenue." *Id.* at 275. But that protection carries little weight if state courts can "decline" to apply it, as the Indiana Supreme Court did here. *See* App. 9. Only this Court can resolve the inherently national question whether the Excessive Fines Clause is incorporated

against all 50 States. Because this case is an ideal vehicle for doing so, the Court should grant certiorari.

OPINIONS BELOW

The opinion of the Indiana Supreme Court is reported at 84 N.E.3d 1179. *See* App. 1-12. The opinion of the Indiana Court of Appeals is reported at 62 N.E.3d 472. *See* App. 13-26. The opinions of the Grant County Superior Court are unpublished, but included in the Appendix at App. 27-34.

JURISDICTION

The Indiana Supreme Court entered judgment on November 2, 2017. *See* App. 1. Petitioners request a writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

1. After his father died, in the winter of 2012, Petitioner Tyson Timbs ("Petitioner") received around $73,000 in life-insurance proceeds. He used $41,558.30 to buy a car—the Land Rover LR2 at issue in this case.

At the time, Petitioner had recently moved to Marion, Indiana, to live with an aunt while he worked on rebuilding his life. Back home in St. Mary's, Ohio, he had become addicted to hydrocodone—an opioid medication prescribed to him for a work-related injury. When he could no longer find pills on the street, he began using heroin.

For a short time in Marion, Petitioner overcame his addiction. But following his father's death, he began using heroin again. With a new Land Rover and more than $31,000 left to spend, Petitioner began driving the vehicle to Richmond, Indiana, and Ohio—sometimes on a daily basis—to buy heroin for his personal use.

His money soon ran out, and Petitioner began looking for new ways to fund his addiction. With the help of a confidential informant, he arranged several drug transactions with undercover officers. On the first such occasion, Petitioner drove across Marion in

the Land Rover and sold officers two grams of heroin for $225. Hrg. Tr. 26:25-27:02 (July 15, 2015). A few days later, he walked from his aunt's house to a nearby gas station, where he sold officers another two grams for $160. Hrg. Tr. 29:16-29:20. While driving to a third transaction, Petitioner was pulled over and arrested. No drugs were found in the vehicle (apart from a prescription pill in the pocket of Petitioner's traveling companion). The Land Rover was seized.

The State of Indiana charged Petitioner with two counts of dealing in a Schedule I controlled substance (a class B felony, *see* Ind. Code § 35-48-4-2(a)(1)(C)) and one count of felony conspiracy to commit theft (a class D felony, *see id.* § 35-43-4-2(a)).[1]

Petitioner pleaded guilty to one count of dealing and to the count of conspiracy to commit theft. The trial court sentenced him to six years, with the first year to be served in home detention and the remaining five years on probation. Petitioner agreed to attend an addiction-treatment program under court supervision. He also agreed to pay police costs of $385, an interdiction fee of $200, court costs of $168, a bond fee of $50,

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[1] In a post-arrest interview, detectives asked why Petitioner and his companion had no heroin in the Land Rover at the time of their arrest, given they were traveling to a meeting at which undercover officers expected to buy heroin. Petitioner told them, "we thought about maybe just pulling up and, if he would've gave me the money, just driving away . . . I'm not really sure what we were going to do." State's Trial Ex. 1 at 19:23-20:00, 21:03-21:25. These statements appear to have been the basis for Petitioner's theft charge.

and a $400 fee for undergoing a drug-and-alcohol assessment with the probation department.

2. Several months after Petitioner's arrest, a private law firm filed a case to forfeit his vehicle on behalf of the State. The complaint "referred only to May 31, 2013"—the date on which Petitioner was arrested while driving to the unconsummated third transaction with officers. *See* App. 21.

Following Petitioner's conviction, the trial court held an evidentiary hearing on the State's forfeiture request. The court found that Petitioner purchased the Land Rover legally using life-insurance proceeds but used the vehicle to "transport . . . heroin back to Marion." App. 28 ¶¶ 2-3. Based on the record, the court determined that forfeiture would be "grossly disproportional to the gravity of [Petitioner's] offense" and thus unconstitutional under the Eighth Amendment's Excessive Fines Clause, App. 29-30 ¶¶ 6-9. "While the negative impact on our society of trafficking in illegal drugs is substantial," the court acknowledged, "a forfeiture of approximately four (4) times the maximum monetary fine is disproportional to [Petitioner's] illegal conduct." App. 30 ¶ 9.

3. A divided panel of the Indiana Court of Appeals affirmed. App. 13-26. The court concluded that "[t]he United States Supreme Court has yet to hold that the Excessive Fines Clause is applicable to the States." App. 17-18 n.4 (citing *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989)). Based on its own precedent, however, the court held

that the Clause applies in state forfeiture proceedings. App. 17-18 n.4 (citing *$100* v. *State*, 822 N.E.2d 1001, 1011 (Ind. Ct. App. 2005)).

After conducting the proportionality assessment required under this Court's excessive-fines precedent, the court of appeals affirmed that forfeiture of Petitioner's vehicle would be unconstitutionally excessive. App. 20 (citing *United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998)). The court compared the value of the Land Rover (about $40,000) to the maximum criminal penalty that could be imposed for Petitioner's offense ($10,000). App. 20-21.[2] The court considered the "financial burdens [that] had already been imposed on [Petitioner] when he pleaded guilty." App. 21. It further concluded that the State's request for forfeiture was based on a single, unconsummated sale of heroin on May 31, 2013. App. 21. "If the State wished to seek forfeiture of the Land Rover based on [Petitioner's] other criminal acts," the court reasoned, "it should have done so more clearly in its forfeiture complaint." App. 21-22. Regardless, the court observed, "the only evidence before the trial court was that [Petitioner] sold heroin twice, both times as a result of controlled buys." *See* App. 22 (noting that "[t]he remaining times he transported heroin, it was apparently for his own use"). Based on this record, the court affirmed that

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[2] Indiana sets a uniform $10,000 maximum fine for every class of felony. *See* Ind. Code §§ 35-50-2-4 to -7.

"[f]orfeiture of the Land Rover . . . was grossly disproportionate to the gravity of [Petitioner's] offense." App. 24.[3]

4. The Indiana Supreme Court granted review and unanimously reversed. App. 1-12. Surveying decisions that have addressed the incorporation of the Excessive Fines Clause, App. 5-7, the court concluded that this Court "has never held that the States are subject to the Excessive Fines Clause," App. 5. Given the "lack of clear direction from the Supreme Court," the court "decline[d] to find or assume incorporation." App. 8. Because this Court has not "decide[d] the issue authoritatively," the Indiana Supreme Court believed that no incorporation analysis was warranted. App. 8. Citing Indiana's status as "a sovereign state within our federal system," the court held that it would not "impose federal obligations on the State that the federal government itself has not mandated." App. 9.

The Indiana Supreme Court acknowledged that its holding broke from the weight of authority. *See* App. 8. The court further acknowledged that "our colleagues on the Court of Appeals and the trial court may be correct in foretelling where the Supreme Court will one

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[3] The dissenting court-of-appeals judge agreed that "the Excessive Fines Clause of the Eighth Amendment may come into play in a forfeiture case," App. 25, but disagreed that forfeiture of Petitioner's Land Rover would be excessive, App. 26. Like the trial court, the court-of-appeals majority addressed the Excessive Fines Clause alone, noting that Petitioner did not raise the separate protection against excessive fines under the Indiana Constitution. *See* App. 18 n.4 (citing Ind. Const. art. I, § 16).

day lead on whether to apply the Clause to the States." App. 9-10. Nonetheless, the court declined to apply the Excessive Fines Clause absent further instruction from this Court.

REASONS FOR GRANTING THE PETITION

Four Terms ago, this Court remarked—correctly—that all three Clauses of the Eighth Amendment apply to the States: "The Eighth Amendment provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,'" and "[t]he Fourteenth Amendment applies those restrictions to the States." *Hall* v. *Florida*, 134 S. Ct. 1986, 1992 (2014). The Court has reaffirmed the same principles on a half-dozen other occasions: in 2008, *Kennedy* v. *Louisiana*, 554 U.S. 407, 419; *Baze* v. *Rees*, 553 U.S. 35, 47 (plurality opinion); in 2005, *Roper* v. *Simmons*, 543 U.S. 551, 560; in 1991, *Harmelin* v. *Michigan*, 501 U.S. 957, 962 (opinion of Scalia, J.); in 1988, *Thompson* v. *Oklahoma*, 487 U.S. 815, 819 n.1 (plurality opinion); and in 1987, *Booth* v. *Maryland*, 482 U.S. 496, 501 n.5, *overruled on other grounds*, *Payne* v. *Tennessee*, 501 U.S. 808 (1991). Put simply, "the Fourteenth Amendment . . . makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Indus.* v. *Leatherman Tool Grp.*, 532 U.S. 424, 433-34 (2001).

The Indiana Supreme Court nonetheless concluded that this Court has been insufficiently "definitive" on the incorporation of the Excessive Fines Clause. App. 9. For that reason, it "decline[d] to find or assume incorporation until the Supreme Court decides the issue authoritatively." App. 8. The court reached this conclusion based on what it labeled "dicta" in *McDonald* v. *City of Chicago*—in which this Court addressed incorporation of the Second Amendment, not the Eighth. *See* App. 8-9. Indiana thus aligned itself with a growing minority of jurisdictions that decline to apply the Excessive Fines Clause when state and local authorities impose economic sanctions.

Given the surge in punitive fines and forfeitures at the state and local levels, the issue of the Clause's incorporation is more pressing now than ever. Only this Court can answer the inherently national question of incorporation, and this case presents the ideal vehicle for resolving that question.

I. The Indiana Supreme Court's decision deepens an existing conflict over whether the Excessive Fines Clause applies to the States.

The Indiana Supreme Court's decision turned on what it called a "lack of clear direction" from this Court. App. 8. While acknowledging that other courts "have either applied the Excessive Fines Clause to challenged state action or assumed without deciding that the Clause applies," the court elected to "await

guidance" from this Court. App. 8. This decision deepens an existing split over whether state courts are required to enforce the federal protection against excessive fines under the Eighth and Fourteenth Amendments.

In large part, this growing divide stems from what state courts—and lower federal courts—have perceived as mixed signals from this Court. In 1989, for example, this Court suggested that it had yet to "decide whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment." *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22. Twelve years later, however, the Court remarked that "the Due Process Clause of the Fourteenth Amendment . . . makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Indus.*, 532 U.S. at 433-34. But in 2010, the Court noted that "[w]e never have decided whether . . . the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause." *McDonald* v. *City of Chicago*, 561 U.S. 742, 765 n.13. At other times, the Court has observed that all three Clauses of the Eighth Amendment apply to the States equally. *See, e.g.*, *Hall*, 134 S. Ct. at 1992; *Kennedy*, 554 U.S. at 419; *Baze*, 553 U.S. at 47 (plurality opinion).

These conflicting statements have left state and federal courts split, leading to "a surprising amount of confusion as to whether the Excessive Fines Clause has been incorporated against the states." *Reyes* v. *N.*

Tex. Tollway Auth., 830 F. Supp. 2d 194, 206 (N.D. Tex. 2011). The majority of courts that have addressed the issue have applied the Clause to the States (Section A, *infra*). A lopsided minority—now including Indiana—have declined to do so (Section B, *infra*).

A. Two Circuits and at least 14 state high courts apply the Excessive Fines Clause to the States.

The Eighth and Ninth Circuits have applied the Excessive Fines Clause to the States. So, too, have the high courts of Alabama, California, Delaware, Georgia, Idaho, Illinois, Kentucky, Massachusetts, Minnesota, Nevada, Ohio, Pennsylvania, Utah, and West Virginia.

These courts view the matter as beyond serious dispute. In *Qwest Corp.* v. *Minnesota Public Utilities Commission*, 427 F.3d 1061 (8th Cir. 2005), for example, the Eighth Circuit reviewed a local exchange carrier's challenge to a state agency's $25.95-million penalty. Drawing on *Cooper Industries*, the court held that "[t]he Eighth Amendment's prohibition of excessive fines applies to the states through the Due Process Clause of the Fourteenth Amendment." *Id.* at 1069 (citing *Cooper Indus.*, 532 U.S. at 433-34). Likewise in *Wright* v. *Riveland*, 219 F.3d 905 (9th Cir. 2000), the Ninth Circuit held that a Washington statute authorizing deduction of inmate funds "is punitive and subject to Eighth Amendment scrutiny" under the Excessive Fines Clause. *Id.* at 915. And two other

Circuits—the Fifth and the Seventh—have frequently remarked on the "open question" of incorporation before forging ahead on the assumption that the Excessive Fines Clause applies to the States. *Simic* v. *City of Chicago*, 851 F.3d 734, 739 (7th Cir. 2017); *see also Cripps* v. *La. Dep't of Agric. & Forestry*, 819 F.3d 221, 234 (5th Cir.), *cert. denied*, 137 S. Ct. 305 (2016); *Disc. Inn, Inc.* v. *City of Chicago*, 803 F.3d 317, 319-20 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1209 (2016); *Vanderbilt Mortg. & Fin.* v. *Flores*, 692 F.3d 358, 374 & n.14 (5th Cir. 2012); *Broussard* v. *Par. of Orleans*, 318 F.3d 644, 652 (5th Cir. 2003).[4]

At the state-court level—where judicial review of state and local fines normally occurs—at least 14 state courts of last resort have applied the Excessive Fines Clause to the States:

Alabama. The Alabama Supreme Court holds that "[t]he forfeiture provisions of our Code are subject to the Excessive Fines Clauses of the Alabama Constitution, Art. I, § 15, and the Eighth Amendment to the

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[4] The Tenth Circuit appears to have taken both sides of the issue. In 1998, the court analyzed the forfeiture of a state pension under the Excessive Fines Clause, rejecting the constitutional claim without commenting on incorporation. *See Hopkins* v. *Okla. Pub. Emps. Ret. Sys.*, 150 F.3d 1155, 1162-63. But, in a recent unpublished decision, the court affirmed the dismissal of a *pro se* appeal in part because "the Excessive Fines Clause has never been incorporated by the Fourteenth Amendment and applied to the states." *Garcia* v. *Wyoming*, 587 F. App'x 464, 469 (10th Cir. 2014).

United States Constitution." *Ex parte Kelley*, 766 So. 2d 837, 840 (Ala. 1999).

California. The California Supreme Court likewise recognizes that "[t]he Due Process Clause of the Fourteenth Amendment to the Federal Constitution . . . makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *People ex rel. Lockyer* v. *R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 420 (Cal. 2005), *as modified* (Jan. 18, 2006) (quoting *Cooper Indus.*, 532 U.S. at 433-34).

Delaware. Answering certified questions, the Delaware Supreme Court has held that "it is clear that civil forfeitures imposed pursuant to Delaware law are subject to the constraints of the Excessive Fines Clause of the Eighth Amendment." *In re 1982 Honda*, 681 A.2d 1035, 1039 (Del. 1996).

Georgia. Answering certified questions, the Georgia Supreme Court has held that "[t]he prohibition against excessive fines of the Eighth Amendment does apply to civil in rem forfeitures under [the State's civil-forfeiture law]." *Thorp* v. *State*, 450 S.E.2d 416, 417 (Ga. 1994), *abrogated on other grounds by Howell* v. *State*, 656 S.E.2d 511 (Ga. 2008).

Idaho. The Idaho Supreme Court "has decided that the Eighth Amendment's prohibition on 'excessive fines' applies to civil *in rem* forfeitures brought under [the State's civil-forfeiture law]." *Idaho State Police ex rel. Russell* v. *Real Prop.*, 156 P.3d 561, 564 (Idaho 2007).

Illinois. The Illinois Supreme Court holds that the Excessive Fines Clause applies to state-law forfeitures. *People ex rel. Waller* v. *1989 Ford F350 Truck*, 642 N.E.2d 460, 466 (Ill. 1994); *see also id.* ("[W]e remand with instructions for the circuit court to expressly consider and determine the excessive fine issue.").

Kentucky. The Kentucky Supreme Court has recognized that "a punitive forfeiture is subject to scrutiny to determine if it violates the 'excessive fines' clauses of the Eighth Amendment to the United States Constitution and section 17 of our Constitution, which contain identical language." *Commonwealth* v. *Fint*, 940 S.W.2d 896, 897-98 (Ky. 1997) (internal citation omitted).

Massachusetts. The Supreme Judicial Court of Massachusetts holds that "[t]he due process clause of the Fourteenth Amendment to the United States Constitution 'makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States.'" *Pub. Emp. Ret. Admin. Comm'n* v. *Bettencourt*, 47 N.E.3d 667, 672 n.7 (Mass. 2016) (quoting *Cooper Indus.*, 532 U.S. at 433-34).

Minnesota. The Minnesota Supreme Court has invalidated fines under "the Excessive Fines Clauses of the United States and Minnesota Constitutions" alike. *State* v. *Rewitzer*, 617 N.W.2d 407, 415 (Minn. 2000); *see also Wilson* v. *Comm'r of Revenue*, 656 N.W.2d 547, 557 (Minn. 2003).

Nevada. The Nevada Supreme Court holds that the Excessive Fines Clause places limits on state-law forfeitures. *Levingston* v. *Washoe Cty.*, 916 P.2d 163, 169 (Nev. 1996) ("While we conclude that excessive fines analysis applies to civil forfeiture actions, insufficient evidence was presented to the district court to determine whether [the government's] forfeiture of the 10th Street home violated the Excessive Fines Clause."), *opinion modified on reh'g on other grounds*, 956 P.2d 84 (Nev. 1998).

Ohio. The Ohio Supreme Court "hold[s] that forfeiture of property, pursuant to [the State's civil-forfeiture law], is a form of punishment for a specified offense and, therefore, is a 'fine' for purposes of Section 9, Article I of the Ohio Constitution and the Eighth Amendment to the United States Constitution." *State* v. *Hill*, 635 N.E.2d 1248, 1256 (Ohio 1994).

Pennsylvania. The Pennsylvania Supreme Court holds that "[t]he Eighth Amendment, and, specifically, the Excessive Fines Clause, is made applicable to the states through the Fourteenth Amendment to the United States Constitution." *Commonwealth* v. *1997 Chevrolet*, 160 A.3d 153, 162 n.7 (Pa. 2017) (citing *Cooper Indus.*, 532 U.S. at 433-34).

Utah. The Utah Supreme Court has recognized that "a forfeiture pursuant to [the State's civil-forfeiture law] is . . . subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *State* v. *A House*, 886 P.2d 534, 541 (Utah 1994); *see also State* v. *Real Prop.*, 994 P.2d 1254, 1256 (Utah 2000)

(invalidating forfeiture as excessive fine "on the basis of the United States Constitution alone").

West Virginia. The Supreme Court of Appeals of West Virginia holds that "[t]he Excessive Fines Clause of the U.S. Constitution is applicable to the states through the Fourteenth Amendment." *Vanderbilt Mortg. & Fin.* v. *Cole*, 740 S.E.2d 562, 570 n.10 (W. Va. 2013) (citing *Cooper Indus.*, 532 U.S. at 433-34); *see also Dean* v. *State*, 736 S.E.2d 40, 42 syl. 6 (W. Va. 2012).[5]

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[5] Intermediate appellate courts in at least nine other jurisdictions have applied the Excessive Fines Clause to the States. *Dami Hosp., LLC* v. *Indus. Claim Appeals Office*, No. 16CA0249, 2017 WL 710497, at *1 (Colo. App. Feb. 23, 2017), *cert. granted in part sub nom. Colo. Dep't of Labor & Emp.* v. *Dami Hosp., LLC*, No. 17SC200, 2017 WL 3977989 (Colo. Sept. 11, 2017) (agreeing to decide, among other questions, "[w]hether the protections of the Excessive Fines Clause of the Eighth Amendment apply to corporations"); *Agresta* v. *City of Maitland*, 159 So. 3d 876, 878 (Fla. Dist. Ct. App. 2015); *Davanne Realty* v. *Edison Twp.*, 972 A.2d 1164, 1167 (N.J. Super. Ct. App. Div. 2009), *aff'd*, 990 A.2d 639 (N.J. 2010); *In re Prop. of Flores*, 711 N.W.2d 733 (table), at *4 (Iowa Ct. App. 2006); *One Car* v. *State*, 122 S.W.3d 422, 423 n.2, 428 (Tex. App. 2003); *State* v. *Bergquist*, 641 N.W.2d 179, 180 (Wis. Ct. App. 2002); *State* v. *Leyva*, 985 P.2d 498, 504 (Ariz. Ct. App. 1998); *Tellevik* v. *Real Prop.*, 921 P.2d 1088, 1093-94 (Wash. Ct. App. 1996); *Attorney-Gen.* v. *One Green 1993 Four Door Chrysler*, 217 A.D.2d 342, 345 (N.Y. App. Div. 1996).

B. Indiana joins Montana, Mississippi, and the Michigan Court of Appeals in holding that the Excessive Fines Clause does not apply to the States.

The Indiana Supreme Court acknowledged parting ways with the weight of authority on the question presented. In so doing, the court aligned itself with a growing minority of jurisdictions that have written off the nationwide force of the Excessive Fines Clause.

In a civil-forfeiture case, like this one, the Montana Supreme Court refused to treat the Excessive Fines Clause as incorporated against the States. *State* v. *2003 Chevrolet Pickup*, 202 P.3d 782, 783 (Mont. 2009). Reasoning that this Court has not clearly incorporated the Clause, the Montana Supreme Court declined to "hold that the Eighth Amendment to the federal constitution is applicable to Montana, when the federal courts have not done so." *Id.*

The Mississippi Supreme Court has taken a similar approach. Relying on a decision that predates the Fourteenth Amendment, that court has twice remarked that "[t]he United States Supreme Court has never held that the Excessive Fines Clause of the Eighth Amendment is applicable to the states." *One (1) Charter Arms, Bulldog 44 Special* v. *State ex rel. Moore*, 721 So. 2d 620, 623 (Miss. 1998) (citing *Pervear* v. *Commonwealth*, 72 U.S. 475 (1866) and *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958), *overruled by Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964)); *One (1) 1979 Ford 15V* v. *State ex rel. Miss. Bureau of Narcotics*, 721

So. 2d 631, 634 (Miss. 1998). For this reason, Mississippi courts evaluate excessive-fines defenses using a unique state constitutional test. *See Galloway* v. *City of New Albany*, 735 So. 2d 407, 412 (Miss. 1999) (discussing four-part test); *One 2011 Chevrolet Silverado 1500* v. *Panola Cty. Narcotics Task Force*, 169 So. 3d 967, 970 (Miss. Ct. App. 2014) (same).

Michigan's lower courts have likewise rejected incorporation. Although the Michigan Supreme Court has not considered the issue, the intermediate court of appeals has three times declined to address properly raised arguments on the ground that "the United States Supreme Court has never determined that the Excessive Fines Clause is applicable to the states through the Fourteenth Amendment." *In re Forfeiture of $25,505*, 560 N.W.2d 341, 347 (Mich. Ct. App. 1996); *see also In re Forfeiture of 5118 Indian Garden Rd.*, 654 N.W.2d 646, 648 (Mich. Ct. App. 2002) (similar); *People* v. *Antolovich*, 525 N.W.2d 513, 515 (Mich. Ct. App. 1994) ("We decline to determine whether the $25,000 fine imposed violates the Eighth Amendment of the United States Constitution."). *But see People* v. *Castillo*, No. 243968, 2004 WL 243417, at *1 (Mich. Ct. App. Feb. 10, 2004) (non-precedential) ("[W]e note that the Supreme Court recently held that the Due Process Clause of the Fourteenth Amendment 'makes the Eighth Amendment's prohibition against excessive fines . . . applicable to the States.'"). Like the high courts of Indiana, Montana, and Mississippi, the Michigan Court of Appeals conducted no meaningful analysis of whether the Fourteenth Amendment

incorporates the Clause against the States. Rather, the court refused to apply the Clause based on the absence of a sufficiently definitive ruling from this Court.

In sum, the state courts taking the minority position have placed the onus on this Court to more clearly hold that the Excessive Fines Clause is incorporated. All of these courts—like the Indiana Supreme Court in this case—have decided that they will not enforce excessive-fines defenses under the Eighth Amendment until this Court decides the question presented.

II. The Indiana Supreme Court's decision conflicts with this Court's precedent.

Review is also warranted because the Indiana Supreme Court's decision conflicts with this Court's incorporation precedent. By any measure, the Eighth Amendment's protection against excessive fines is deeply rooted in our nation's legal tradition, making it a clear candidate for incorporation. By declining to apply the Clause, the Indiana Supreme Court thus broke with this Court's precedent at a fundamental level. The court compounded that error by failing to undertake the incorporation analysis. By "await[ing] guidance" from this Court, App. 8, the Indiana Supreme Court neglected its "coordinate responsibility" to determine whether the Clause protects people like Petitioner from excessive fines imposed by state and local authorities, *see Howlett* v. *Rose*, 496 U.S. 356, 367 (1990).

1. The Excessive Fines Clause applies to the States under a straightforward application of this Court's precedent. Along with the other Civil War Amendments, the Fourteenth Amendment "fundamentally altered our country's federal system." *McDonald*, 561 U.S. at 754. And under the selective-incorporation doctrine, "almost all of the provisions of the Bill of Rights" apply not just to the federal government, but to the States and municipalities as well. *Id.* at 764; *see also id.* ("The Court . . . shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause."). In determining whether one of the Bill of Rights' provisions applies to the States, the Court asks whether the right in question "is fundamental to our scheme of ordered liberty," *id.* at 767 (emphasis omitted), and, relatedly, whether it "is 'deeply rooted in this Nation's history and tradition,'" *id.* (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997)). Unsurprisingly, virtually all of the rights the Framers enshrined in the first eight amendments satisfy this test.

The Eighth Amendment's protection against excessive fines is no different. On at least seven occasions, this Court has said that the Clause applies to the States by way of the Fourteenth Amendment.[6] Like the protections against "cruel and unusual punishments" and "excessive bail"—which the Court long ago applied

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[6] *Hall*, 134 S. Ct. at 1992; *Kennedy*, 554 U.S. at 419; *Baze*, 553 U.S. at 47 (plurality opinion); *Cooper Indus.*, 532 U.S. at 433-34; *Harmelin*, 501 U.S. at 962 (opinion of Scalia, J.); *Thompson*, 487 U.S. at 819 n.1 (plurality opinion); *Booth*, 482 U.S. at 501 n.5.

to the States—the Excessive Fines Clause "prevent[s] the government from abusing its power to punish." *Austin* v. *United States*, 509 U.S. 602, 607 (1993) (emphasis omitted). Together, the three Clauses "place[] limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments." *Browning-Ferris Indus.*, 492 U.S. at 275. By working in harmony "to prohibit all excessive punishments," *Atkins* v. *Virginia*, 536 U.S. 304, 311 n.7 (2002), the Clauses secure Americans' life, liberty, and property, *see* U.S. Const. amend. XIV, § 1. There is thus "no reason to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation." *Browning-Ferris Indus.*, 492 U.S. at 284 (O'Connor, J., concurring in part and dissenting in part). All three Clauses stand as "parallel limitations" securing the same unitary right to be free from disproportionate punishment. *See id.* at 263 (majority opinion); *cf. Trop* v. *Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

Like the rest of the Eighth Amendment, of course, the Excessive Fines Clause is also "deeply rooted" in our constitutional tradition. *See McDonald*, 561 U.S. at 767. At the time of ratification, "at least eight of the original States . . . had some equivalent of the Excessive Fines Clause in their respective Declarations of Rights or State Constitutions." *Browning-Ferris Indus.*, 492 U.S. at 264. The Eighth Amendment's language was borrowed from the Virginia

Declaration of Rights, which drew from the 1689 English Bill of Rights, which in turn declared that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689), *quoted in Browning-Ferris Indus.*, 492 U.S. at 266-67. Blackstone traced the constitutional protection against excessive fines back further still, to Magna Carta, and before that to the reign of Henry II. *See* 4 William Blackstone, Commentaries *372; *see generally McDonald*, 561 U.S. at 768 (looking to Blackstone and the English Bill of Rights to determine that the Second Amendment is incorporated).

The same mistrust of the government's power to punish inspired the Eighth Amendment. The "primary focus" of the Amendment "was the potential for governmental abuse of its 'prosecutorial' power," *Browning-Ferris Indus.*, 492 U.S. at 266, with the Excessive Fines Clause in particular "limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends," *id.* at 267. In adopting the Eighth Amendment, the Framers thus "uncritically claim[ed] a liberty of their heritage." *See* Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 Harv. J.L. & Pub. Pol'y 119, 134 (2004). Relying on Anglo-American legal traditions, they recognized that economic sanctions can impose burdens no less punishing than incarceration; an excessive fine, after all, can "amount[] to imprisonment for life." 4 William Blackstone Commentaries *373. When the Fourteenth Amendment was ratified, in 1868, these

same concerns persisted. By that time, 35 state constitutions included protections against excessive fines. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 82 (2008); *cf. McDonald*, 561 U.S. at 769, 777 (looking to state constitutions during the periods surrounding ratification of the Bill of Rights and the Fourteenth Amendment to determine incorporation).

For these reasons, the Framers counted the protection against excessive fines as among those fundamental rights that are essential to our system of ordered liberty, and the Fourteenth Amendment's ratifiers intended that protection to apply to the States.

2. Like the courts of Montana, Mississippi, and Michigan, the Indiana Supreme Court took account of none of these principles. In that court's view, it was enough that this Court has not issued a "definitive holding" on the question of the Excessive Fines Clause's incorporation. App. 9. And because "Indiana is a sovereign state within our federal system," the court "elect[ed] not to impose federal obligations on the State that the federal government itself has not mandated." App. 9. Until this Court "decides the issue authoritatively," the Indiana Supreme Court thus announced that it would "decline to subject Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution." App. 8, 9 (emphasis in original).

Far from being "cautious," App. 8, this reasoning raises grave constitutional concerns in its own right. Our federal system "charges state courts with a coordinate responsibility" to give effect to all Americans' federally protected rights. *Howlett*, 496 U.S. at 367. This includes deciding whether federal constitutional provisions like the Excessive Fines Clause protect against penalties levied by state and local governments. For "the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Id.*; *see also Claflin* v. *Houseman*, 93 U.S. 130, 137 (1876) (explaining that federal and state courts both must enforce "the laws of the United States"). By declining to engage with this issue, the Indiana Supreme Court thus effectively "den[ied] a federal right." *Howlett*, 496 U.S. at 369.

By dismissing the Excessive Fines Clause as "a *federal* test" that could "impede development" of state law, App. 9, the Indiana Supreme Court also misunderstood the supremacy of the federal Constitution, *see* U.S. Const. art. VI, cl. 2. State courts—no less than federal courts—must give effect to the Constitution. And it is never the case that a constitutional protection should remain unincorporated simply to avoid interfering with state laws. *See McDonald*, 561 U.S. at 790 (plurality opinion) ("Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights."). Yet the Indiana Supreme Court's reasoning begins and ends with that flawed premise. *See* App. 9. The Court should thus grant certiorari, reaffirm the state courts' coordinate

duty to enforce federally protected rights, and hold that the Excessive Fines Clause is incorporated against the States.

III. The question presented raises issues of national importance that warrant this Court's review.

As suggested by the number of courts that have considered the question presented, *see* pp. 13-21, *supra*, whether the Excessive Fines Clause applies to the States is an important and recurring issue. It is important in all 50 States (and countless localities), which levy fines and forfeit property on a daily basis. And it is important to the many Americans every year targeted for punitive economic sanctions by state and local authorities. As the Indiana Supreme Court put it, only a "definitive holding" from this Court (App. 9) will guarantee that the Clause can act as a truly national counterweight to the "terrifying force of the criminal justice system." *Robertson* v. *United States ex rel. Watson*, 560 U.S. 272, 273 (2010) (Roberts, C.J., dissenting from dismissal of certiorari). There is no reason to wait to resolve the question presented, and this case is the perfect vehicle in which to do so.

A. The Excessive Fines Clause is a key protection against punitive economic sanctions by States and municipalities.

The main evil addressed by the Excessive Fines Clause—like its precursors in the English Bill of

Rights and Magna Carta—is the sovereign impulse to "use[ ] the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual." *See Browning-Ferris Indus.*, 492 U.S. at 275. This constitutional safety valve is as urgently needed today as ever. Particularly at the state and local levels, "many lawmakers use economic sanctions in order to avoid increasing taxes while maintaining governmental services, with some lawmakers even including increases to revenues generated from economic sanctions in projected budgets." Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. (forthcoming 2018) (footnotes omitted).

Like the Stuart practices that inspired the Excessive Fines Clause, modern economic sanctions also "target the politically vulnerable." *Id.* "Fines, fees, and forfeitures can have devastating consequences on those who are financially vulnerable, particularly in low-income communities and communities of color that are most likely to be heavily policed." Beth A. Colgan, "Fines, Fees, and Forfeitures" in *Reforming Criminal Justice – Volume 4: Punishment, Incarceration, and Release* 212 (Erik Luna ed. 2017) (footnote omitted). In Ferguson, Missouri, for example, the U.S. Department of Justice determined that "[c]ity officials have consistently set maximizing revenue as the priority for . . . law enforcement activity." U.S. Dep't of Justice, *Investigation of the Ferguson Police Department*, at 9 (Mar. 4, 2015). The roughly 3,000 residents of nearby Pagedale—five miles to the south of

Ferguson—have been fined for trivial offenses like missing curtains, aging paint, walking on the left side of crosswalks, and enjoying a beer within 150 feet of a grill. *See* George F. Will, *A Missouri town demands substantive due process*, The Wash. Post (Dec. 11, 2015), https://goo.gl/Jfq667. From 2010 to 2013, the number of non-traffic tickets in Pagedale increased 495%, with the city collecting $356,601 in associated fines and fees in 2013 alone. *Id.* In 2014, authorities issued nearly enough non-traffic tickets for each household within city limits to receive two. *See* Jennifer S. Mann, *Lawsuit filed against Pagedale for ticketing high grass and other code violations*, St. Louis Post-Dispatch (Nov. 4, 2015), https://goo.gl/Qmc86R.

In civil-forfeiture cases, like this case, the Excessive Fines Clause is a vitally important check on the government's impulse to punish disproportionately. In the majority of States and at the federal level, when property is forfeited most (and often all) of the resulting proceeds flow to law-enforcement coffers, frequently those of the seizing agency. As a result, state and federal agencies have increasingly resorted to civil forfeiture as a revenue-raising tool. In 2012 alone, agencies in 26 States and the District of Columbia took in more than $254 million through forfeiture. Institute for Justice, Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 11 (2d ed. 2015), https://goo.gl/sY32sT. (Between 2001 and 2014, total deposits in the Department of Justice and Treasury forfeiture funds approached $29 billion. *Id.* at 10.) Nationwide, the modern civil-forfeiture system "has

led to egregious and well-chronicled abuses." *Leonard* v. *Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari). And, like economic sanctions generally, forfeitures "frequently target the poor and other groups least able to defend their interests in forfeiture proceedings." *Id.*

Indiana vividly illustrates these national problems. As one prosecutor declared after law enforcement acquired a financial stake in civil forfeiture, "the statute is limited only by your own creativity." Joseph T. Hallinan, *Police can take crime cash but can't dish it out*, The Indianapolis Star, Feb. 2, 1986, at 6B. Moreover, Indiana's forfeiture system has inspired a unique set of abuses. Unlike every other State, Indiana allows local prosecutors to outsource their civil-forfeiture cases to private-sector lawyers on a contingency-fee basis. *See* Ind. Code § 34-24-1-8. Petitioner's case, for example, was prosecuted by a private law firm. *See* App'x of Appellant at 10-11, *State* v. *Timbs*, No. 27A04-1511-MI-1976 (Ind. Ct. App. filed Mar. 30, 2016) (complaint); *see generally* David P. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 1.01, at 1-13 (LexisNexis 2017) ("The biggest scandal of all is Indiana's institutionalized bounty hunter system in which state DAs contract with *private* attorneys to handle all of the county's civil forfeiture cases for a contingent fee of a quarter or a third of all the property they forfeit.").

This system of mercenary prosecutors only magnifies the Excessive Fines Clause's animating concern: that state power will be harnessed "for raising revenue in unfair ways, or for any other improper use."

Browning-Ferris Indus., 492 U.S. at 272. Predictably, private-sector lawyers pocket hundreds of thousands of dollars based on forfeitures. *See generally* Heather Gillers et al., *Cashing in on crime: Indiana law allows prosecutors to farm out forfeiture cases to private lawyers – who get a cut of the money*, The Indianapolis Star, Nov. 14, 2010, at A1. One deputy prosecutor litigated criminal cases while moonlighting as a contingency-fee lawyer in parallel forfeiture proceedings. "On numerous occasions when the ethics of the asset forfeiture procedures were called into question," the Indiana Supreme Court later found, "[the prosecutor] turned a blind eye and acted to protect his private interest in his continued pursuit of forfeiture property." *In re McKinney*, 948 N.E.2d 1154, 1155-56 (Ind. 2011). In the same county, a local trial court investigated the same system, which it termed "a carefully crafted assault on the judicial system and court adjudication of civil forfeitures." Findings and Report on Civil Drug Forfeitures in Division 2, Including a Limited Number of Cases in the Other Four Divisions of the Delaware Circuit Court, at 6 (Ind. Cir. Ct., Delaware Cty. Aug. 18, 2008), https://goo.gl/TCHk4S; *see also id.* at 13 ("The handling of civil drug forfeitures amounts to fraud on the court.").

Elsewhere in Indiana, a county council sued its local sheriff and prosecutor over their "respective roles in administering civil forfeiture proceedings, including most notably the handling of funds therefrom." *Knox Cty. Council* v. *Sievers*, 895 N.E.2d 1263, 1265 (Ind. Ct. App. 2008). As alleged in that case, the state auditing

agency "found a deficiency balance of $51,987.00 in the Drug Seizure Fund," *id.*, but law-enforcement officials refused to produce even basic information "concerning the financial aspects of [the county's] civil forfeiture proceedings," *id.* at 1266. And last year, a federal audit found that Indiana's Henry County and a neighboring police department misspent more than $300,000 in federal forfeiture money on "unallowable purchases" and "unallowable salary and fringe benefit costs." Office of the Inspector Gen., U.S. Dep't of Justice, *Audit of Henry County Sheriff's Office's Equitable Sharing Program Activities, New Castle, Indiana* at 4 (Feb. 2017), https://goo.gl/A56PuJ.

For ordinary citizens—many of them low-level drug offenders or innocent property owners—the real-world consequences are profound. With economic sanctions serving as both punishment and revenue source, "law enforcement Weapons of Mass Destruction" are increasingly deployed against "pedestrian targets." *Sargent* v. *State*, 27 N.E.3d 729, 735 (Ind. 2015) (Massa, J., dissenting). In one case, Indianapolis law enforcement sued to forfeit a teenager's car, which was found with "a large quantity of Gatorade bottles and assorted snacks and candies" stolen from a playground concession stand. *See* Pls.' Mot. Summ. J., *State* v. *Jaynes*, No. 49D01-1111-MI-043642, 2012 WL 12974140 (Ind. Super. Ct., Marion Cty. filed May 23, 2012). In another case, the State tried to forfeit a woman's 1996 Buick Century after she attempted to shoplift four iPhones. *Sargent*, 27 N.E.3d at 731. When the Indiana Supreme Court rejected that forfeiture on

statutory grounds, *see id.* at 733, even a dissenting justice voiced bewilderment at the State's "overreach," *id.* at 735 (Massa, J., dissenting); *see also id.* at 734 ("But really? Firing Sargent and having her righteously prosecuted for felony theft was not enough? The State had to take her car, too?").

The abuse of fines and forfeitures is not unique to Indiana. Nor is it new. The pressure to generate "royal revenue" is a well-recognized byproduct of any system of economic sanctions. *See Browning-Ferris Indus.*, 492 U.S. at 271. Unlike every other form of punishment—all of which cost the government money—"fines are a source of revenue." *Harmelin*, 501 U.S. at 978 n.9 (opinion of Scalia, J.). So "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." *Id.* Because "the State stands to benefit" from levying fines, *id.*, there is a singular risk that governments—federal, state, and local alike—will exercise their punitive powers with an eye toward revenue, rather than justice. The Excessive Fines Clause is an essential check on the many unjust punishments that can result from such perverse incentives. *Cf. McDonald*, 561 U.S. at 918 (Breyer, J., dissenting) (considering "the extent to which incorporation will further other, perhaps more basic, constitutional aims").

B. National uniformity is critical.

Few questions are more demanding of national resolution than which provisions of the Bill of Rights

apply to the several States. By setting a constitutional floor securing individual liberty, the Fourteenth Amendment "fundamentally restructured the relationship between individuals and the States." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring). That principle makes this Court's intervention particularly warranted in a case like this. As the Indiana Supreme Court recognized, this Court plays a unique role in deciding incorporation issues. *See* App. 8-9. All 50 States, as well as their residents, need to know which federal protections apply in state proceedings. In this way, every question of incorporation bears on the nation as a whole, and this Court alone can provide a nationwide answer.

Of course, the federal-state balance is not just "a matter of rights belonging only to the States." *Bond* v. *United States*, 564 U.S. 211, 222 (2011). It also "protects the liberty of the individual from arbitrary power," *id.*, with the Fourteenth Amendment "add[ing] greatly to the dignity and glory of American citizenship, and to the security of personal liberty," *Plessy* v. *Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting). To be a meaningful right of American citizenship, however, a right must have equal force throughout the nation. Today, the Eighth Amendment's protection against excessive fines applies in some places, but not others. The Clause protects people in Idaho, but not Montana; it protects people in Alabama, but not Mississippi; and—with the Indiana Supreme Court's decision in this case—it protects people in Illinois, but not Indiana.

By "elect[ing] not to impose federal obligations on the State," App. 9, the Indiana Supreme Court has also undermined the rights of people far beyond Indiana's borders. For instance, Indianapolis is home to one of the nation's central FedEx hubs,[7] which state and local law enforcement routinely comb for cross-country shipments of cash to seize. *See generally Bowman* v. *State*, 81 N.E.3d 1127, 1131 (Ind. Ct. App. 2017), *pet. for transfer pending* (holding parcel-seizure practices unlawful). In 2017 alone, Indianapolis prosecutors sued to forfeit—or to transfer to the federal government—over $1.5 million in currency seized in this fashion.[8]

With the Indiana Supreme Court's decision in this case, whether citizens fighting these seizures enjoy any protection under the Excessive Fines Clause depends on happenstance: whether a particular shipment is routed through Indiana and whether a prosecutor there decides to seek forfeiture in a state forum or a federal one. The prosecutor may elect to transfer the property to federal agencies for forfeiture under federal law, in which case the Clause would apply. *See generally* Office of the Att'y Gen., Order No. 3946-2017 (Federal Forfeiture of Property Seized by State and Local Law Enforcement Agencies) (July 19, 2017). Or the prosecutor may proceed in state court, in which case the Clause would not apply.

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[7] *See* Paris Lewbel, *Take a look inside Indy's FedEx hub, the second-largest in the U.S.*, Indy Channel (Dec. 15, 2017), https://goo.gl/g2wp41.

[8] This figure is derived from filings available on Indiana's online case-management system.

This situation calls out for correction. Federally protected rights should never depend on state borders, much less on how commercial carriers choose to route their shipments. "The National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States, and all persons within those respective jurisdictions may invoke its protection." *Kennedy*, 554 U.S. at 412. Despite the Court's many statements to this effect, however, state courts and ordinary Americans are in need of a "definitive holding" on whether the Excessive Fines Clause applies to the States. *See* App. 9.

C. This case is a good vehicle for deciding the question presented.

This case offers an excellent vehicle for resolving the question presented. The Excessive Fines Clause was the sole basis for the decisions of the trial court, App. 27-30, and court of appeals, App. 13-26. Both courts believed that the Clause was incorporated and so they applied the Clause and ruled in Petitioner's favor on the merits, holding that forfeiture of his vehicle would be "grossly disproportionate to the gravity of [his] offense." App. 24, 29-30. The Indiana Supreme Court did not consider whether the lower courts correctly applied the Clause, however. App. 4 ("Before addressing whether forfeiture of Timbs's Land Rover would be an excessive fine, we must decide the antecedent question of whether the Excessive Fines Clause applies to forfeitures by the State."). Instead, the state

high court reversed on one ground: This Court has not "authoritatively" held that the Clause applies to the States. App. 8. That decision turned on no factual findings or matters of state law. And, like the lower courts in *Austin*, the Indiana Supreme Court "had no occasion to consider what factors should inform [the Eighth Amendment analysis] because it thought it was foreclosed from engaging in the inquiry." *See Austin*, 509 U.S. at 622. The incorporation question could not be more cleanly presented.

Nor is there any reason to delay addressing the issue, which this Court raised nearly three decades ago. *See Browning-Ferris Indus.*, 492 U.S. at 276 n.22. Further percolation serves little purpose. Every court that has dealt with this issue has (tacitly or expressly) looked to this Court for guidance. The courts that apply the Clause to the States do so because they view this Court's prior statements as commanding incorporation. *See supra* pp. 13-18. Conversely, those courts that decline to apply the Clause have read the very same statements and concluded they leave the incorporation issue unsettled. *See supra* pp. 19-21. Those courts taking the minority position—Montana, Mississippi, the Michigan Court of Appeals, and now Indiana—have not analyzed whether the Clause applies to the States under this Court's incorporation precedent. Rather, like Indiana, they have decided that, until this Court issues a "definitive holding," they will "elect not to impose federal obligations on the State that the federal government itself has not mandated." *See* App. 9.

This Court should grant review, hold that the Excessive Fines Clause applies to the States, and reaffirm that state courts—like the federal courts—bear "the duty to safeguard and enforce the right of every citizen." *Howlett*, 496 U.S. at 368 (quoting *Minneapolis & St. L.R. Co.* v. *Bombolis*, 241 U.S. 211, 222 (1916)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the
Indiana Supreme Court

No. 27S04-1702-MI-70

STATE OF INDIANA,

Appellant (Plaintiff below),

v.

TYSON TIMBS,

Appellee (Defendant below).

Appeal from the Grant Superior Court 1,
No. 27D01-1308-MI-92
The Honorable Jeffrey D. Todd, Judge

On Petition to Transfer from the Indiana Court
of Appeals, No. 27A04-1511-MI-1976

November 2, 2017

Slaughter, Justice.

The State sought to forfeit Defendant's Land Rover after he used it to transport illegal drugs. The trial court held the proposed forfeiture would violate the Eighth Amendment's Excessive Fines Clause. We conclude the Excessive Fines Clause does not bar the State from forfeiting Defendant's vehicle because the United States Supreme Court has not held that the Clause applies to the States through the Fourteenth Amendment.

Factual and Procedural History

Defendant, Tyson Timbs, used life-insurance proceeds after his father's death to pay $42,058.30 for a Land Rover in January 2013. Over the next four months, Timbs regularly drove the Land Rover between Marion and Richmond, Indiana, to buy and transport heroin. Timbs's trafficking came to the attention of a confidential police informant, who told a member of the Joint Effort Against Narcotics team that he could buy heroin from Timbs. Police set up a controlled buy, and the informant and an undercover detective bought two grams of heroin from Timbs for $225. Police made another controlled buy a couple of weeks later, acquiring another two grams of heroin for $160. During the second buy, the detective set up a third controlled buy with Timbs. The day the third buy was to occur, police apprehended Timbs during a traffic stop. The Land Rover had 1,237 miles on its odometer when

Timbs bought it in January, and more than 17,000 miles when police seized the vehicle in late May.

In June 2013, the State charged Timbs with two counts of Class B felony dealing in a controlled substance and one count of Class D felony conspiracy to commit theft. Nearly two years later, in 2015, Timbs pleaded guilty to one count of Class B felony dealing and one count of Class D felony conspiracy to commit theft in exchange for the State's dismissing the remaining charge. The trial court accepted the plea and sentenced Timbs to six years, with one year executed in community corrections and five years suspended to probation. Timbs also agreed to pay police costs of $385, an interdiction fee of $200, court costs of $168, a bond fee of $50, and a $400 fee for undergoing a drug-and-alcohol assessment with the probation department.

Within a couple months of bringing criminal charges, the State also sought to forfeit the Land Rover. After a bench trial, the court issued written findings that denied the State's action, concluding that forfeiture would be an excessive fine under the Eighth Amendment. "The amount of the forfeiture sought is excessive, and is grossly disproportional to the gravity of the Defendant's offense." The trial court observed that the maximum statutory fine for Timbs's Class B felony was $10,000 on the day he was arrested and noted the vehicle was worth approximately four times this amount when he bought it just a few months earlier. The court made no finding about the vehicle's value on Timbs's arrest date. Based on its holding, the

court ordered the State to release the vehicle immediately. A divided Court of Appeals affirmed. *State v. Timbs*, 62 N.E.3d 472 (Ind. Ct. App. 2016). We granted transfer, thus vacating the Court of Appeals' opinion, and now reverse.

Standard of Review

Before addressing whether forfeiture of Timbs's Land Rover would be an excessive fine, we must decide the antecedent question of whether the Excessive Fines Clause applies to forfeitures by the State. Whether a Bill of Rights provision applies to the States is a purely legal question. We review such questions de novo. *State v. Harper*, 8 N.E.3d 694, 696 (Ind. 2014). Unlike legal questions, a trial court's factual determinations are reviewed for clear error. *Fischer v. Heymann*, 12 N.E.3d 867, 870 (Ind. 2014). We will not reweigh evidence or determine the credibility of witnesses, and we will consider only the evidence favorable to the judgment and the logical inferences drawn from it. Ind. Trial Rule 52(A); *Hitch v. State*, 51 N.E.3d 216, 226 (Ind. 2016).

Discussion and Decision

I. The United States Supreme Court has never enforced the Excessive Fines Clause against the States, and we opt not to do so here.

The framers' original conception was settled long ago that the Bill of Rights applies only to the national government and cannot be enforced against the States.

See Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833). Only after ratification of the Fourteenth Amendment did the Supreme Court, in the early twentieth century, begin to apply various provisions of the Bill of Rights to the States through the doctrine of selective incorporation. Justice Black's argument for total incorporation of the Bill of Rights, *see, e.g.*, *Adamson v. California*, 332 U.S. 46, 71-72, 89 (1947) (Black, J., dissenting), has never carried the day. *McDonald v. City of Chicago*, 561 U.S. 742, 761-63 (2010).

To date, the Supreme Court has incorporated most of the first eight amendments – with a few notable exceptions: the Third Amendment's protection against quartering soldiers, the Fifth Amendment's grand-jury requirement, and the Seventh Amendment's right to a civil jury trial. *Id.* at 765 n.13 (citations omitted). At issue here is whether the Eighth Amendment's Excessive Fines Clause is enforceable against the States. We hold it is not.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Supreme Court has never held that States are subject to the Excessive Fines Clause. The Court initially declined to decide the Clause's incorporation status.

> Because of the result we reach today, we need not answer several questions that otherwise might be necessarily antecedent to finding the

> Eighth Amendment's Excessive Fines Clause applicable to an award of punitive damages, . . . [including] whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment[.]

Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 n.22 (1989).

A dozen years later, in a case involving not a fine but another punitive-damages award, the Supreme Court stated in dictum that the Fourteenth Amendment's Due Process Clause "makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001) (citing *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam)). A prominent treatise on criminal procedure observed that *Cooper*'s statement incorporating the Excessive Fines Clause was merely dictum. "In noting that the due process clause also incorporated the Eighth Amendment prohibitions against excessive fines and cruel and unusual punishments, the Court cited *Furman v. Georgia*, . . . which involved an application of the prohibition against cruel and unusual punishments." Wayne R. Lafave et al., Criminal Procedure § 2.6(b), n.45 at 833 (4th ed. 2015).

Despite *Cooper*'s 2001 dictum that the Clause can be enforced against States, the Supreme Court's most recent pronouncement on this subject, in 2010, suggests the Clause has not been incorporated after all. *McDonald*, 561 U.S. at 765 n.13. *McDonald* was an

incorporation case. At issue was whether the Second Amendment's individual right to keep and bear arms, recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), is enforceable against the States. *McDonald* held that it is – a position commanding the support of five Justices, four of whom agreed it was enforceable through the Due Process Clause. Only Justice Thomas believed the basis for decision should be the Privileges and Immunities Clause. *McDonald*, 561 U.S. at 805-58 (Thomas, J., concurring in part and in the judgment). En route to deciding that the Second Amendment applies to the States, *McDonald* observed that "[o]nly a handful of the Bill of Rights protections remain unincorporated", *id.* at 765, and included on that list "the Eighth Amendment's prohibition on excessive fines." *Id.* at 765 n.13. Citing only *Browning-Ferris* and not *Cooper*, the Court stated, "We have never decided whether the . . . Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause." *Id.*

It is not self-evident why the *McDonald* Court did not mention *Cooper*. Perhaps the omission was an oversight, though we will not conclude lightly that the Supreme Court whiffed on the existence or meaning of its precedent. The more likely explanation is that *McDonald* was treating *Cooper*'s statement as superfluous to *Cooper*'s holding and therefore dictum. Just as *Cooper*'s statement that the Excessive Fines Clause is enforceable against the States is dictum, so too is *McDonald*'s statement that the Clause is not.

So where does that leave us? Given the lack of clear direction from the Supreme Court, we have a couple of options. One option is to ignore *McDonald* and follow the lead of some courts that have either applied the Excessive Fines Clause to challenged state action or assumed without deciding that the Clause applies. *See, e.g.*, *Hamilton v. City of New Albany, Indiana*, ___ Fed. Appx. ___, 2017 WL 2615453, at *5 (7th Cir. Jun. 16, 2017) (vacating summary judgment for city on plaintiff's federal excessive-fines claim and remanding for trial without mentioning incorporation or *McDonald*); *Cripps v. Louisiana Dep't of Agriculture and Forestry*, 819 F.3d 221, 234 (5th Cir. 2016) ("Assuming *arguendo* that the Excessive Fines Clause applies, the record indicates that each of Plaintiffs' offenses resulted in fines that do not exceed the limits prescribed by the statute authorizing it."); *Discount Inn, Inc. v. City of Chicago*, 803 F.3d 317, 320 (7th Cir. 2015) (holding that "the fines imposed by the challenged [city] ordinances are not excessive even if the 'excessive fines' clause is applicable"); *Public Employee Retirement Admin. Comm'n v. Bettencourt*, 47 N.E.3d 667, 672 n.7, 681 (Mass. 2016) (holding forfeiture violates federal excessive-fines clause based on *Cooper* without mentioning *McDonald*).

A second option is to await guidance from the Supreme Court and decline to find or assume incorporation until the Supreme Court decides the issue authoritatively. We choose this latter, more cautious approach for two reasons. First, although the Supreme Court has addressed this issue only in dicta, its

statement in *McDonald* that the Clause has not been incorporated is entitled to more weight because it is the Court's most recent. Second, Indiana is a sovereign state within our federal system, and we elect not to impose federal obligations on the State that the federal government itself has not mandated. An important corollary is that Indiana has its own system of legal, including constitutional, protections for its citizens and other persons within its jurisdiction. Absent a definitive holding from the Supreme Court, we decline to subject Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution.

Although we ultimately disagree with our Court of Appeals' decision to apply the Excessive Fines Clause to the State's forfeiture, we understand the Court's reason for doing so. After all, the State specifically advised the Court that it "need not decide [the issue of incorporation] . . . because the penalties imposed were not unconstitutionally excessive." Despite the State's choice not to wage the incorporation battle here, we need not abide a party's consent to a misstatement or misapplication of law. *Stephenson v. State*, 864 N.E.2d 1022, 1030 (Ind. 2007). We reserve to ourselves – not the parties – the prerogative to pronounce what law governs a particular dispute. The parties' consensus here to subject the State's forfeiture to review under the Clause does not require that we follow su[illegible] And we decline to do so, mindful that our colleagues on the Court of Appeals and the trial court may be correct in

foretelling where the Supreme Court will one day lead on whether to apply the Clause to the States.

To be clear, our decision on incorporation should not be read to prejudge the merits of pending or prospective forfeiture challenges based on *other* provisions of state or federal law. Our narrow holding here is confined to the Court of Appeals' reliance on a provision of the United States Constitution – the Excessive Fines Clause – that the Supreme Court has never enforced against the States. We decline to address other potential problems with the State's forfeiture because Timbs raised only an excessive-fines challenge under federal law.

II. Based on the trial court's findings, the State proved it is entitled to forfeit the Land Rover.

Because we have resolved the Eighth Amendment issue against Timbs, we turn to whether the State proved its entitlement to forfeit the vehicle under Indiana law. The governing statute provides, in pertinent part, that to obtain forfeiture the State must show that a person used the vehicle to transport an illicit substance listed in the statute for the purpose of dealing or possessing the substance.

> Sec. 1. (a) The following may be seized:
>
> (1) All vehicles . . . , if they are used . . . by the person . . . in possession of them to transport . . . the following:

> (A) A controlled substance for the purpose of committing . . . any of the following:
>
> (i) Dealing in or manufacturing cocaine or a narcotic drug (IC 35-48-4-1)
>
> * * *
>
> (iii) Dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2)
>
> * * *
>
> (vii) Possession of cocaine or a narcotic drug (IC 35-48-4-6)

I.C. § 34-24-1-1 (Supp. 2012). *See also Katner v. State*, 655 N.E.2d 345, 349 (Ind. 1995).

After a bench trial, the trial court made the following factual findings relevant here.

> Between the date of purchase, and May 31st, 2013, [Timbs] drove the vehicle frequently from Marion to Richmond to purchase heroin. The Land Rover was used by [Timbs] to transport heroin back to Marion. [Timbs] both used and sold the heroin. When the Land Rover was seized by the State at the end of May 2013, the odometer reading was between 17,000 and 18,000 miles. The increased mileage primarily resulted from [Timbs] traveling between Marion and Richmond to engage in illegal drug trafficking.

On appeal, Timbs challenges these findings under the corpus-delicti rule, which requires independent evidence of a crime beyond the defendant's confession. But the rule applies only to an *out-of-court* confession in a *criminal* proceeding and thus does not benefit Timbs. *See Willoughby v. State*, 552 N.E.2d 462, 466 (Ind. 1990). Timbs's inculpatory testimony occurred *in court*, while his counsel was present, in this *civil*-forfeiture proceeding, where he admitted to multiple trips to Richmond in the Land Rover to acquire heroin and transport it back to Marion. Because corpus delicti is no obstacle to the use of Timbs's testimony, the court's findings are supported by the evidence, and the State proved them by the required preponderance of the evidence, I.C. § 34-24-1-4(a). These findings establish each of the statutory elements recited above to prove the State's entitlement to forfeit the Land Rover – namely, that Timbs used the vehicle to transport and possess heroin, a schedule I controlled substance, *id.* § 35-48-2-4(c) (Supp. 2013), and a narcotic drug, *id.* §§ 35-48-2-4(c), 35-48-1-20(1) (2008 Repl.), for the purpose of engaging in illegal drug trafficking.

Conclusion

For these reasons, we reverse the trial court's judgment for Timbs and remand with instructions to enter judgment for the State on its forfeiture complaint.

Rush, C.J., and David, Massa, and Goff, JJ., concur.

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IN THE
COURT OF APPEALS OF INDIANA

State of Indiana, *Appellant-Plaintiff*, v. Tyson Timbs and a 2012 Land Rover LR2, *Appellees-Defendants.*	October 20, 2016 Corrected Court of Appeals Case No. 27A04-1511-MI-1976 Appeal from the Grant Superior Court 1 The Honorable Jeffrey D. Todd, Judge Trial Court Cause No. 27D01-1308-MI-92

Mathias, Judge.

[1] The State of Indiana filed a complaint for forfeiture in Grant Superior Court seeking to obtain a 2012 Land Rover LR2 owned by Tyson Timbs ("Timbs"). The trial court ruled in favor of Timbs, and the State appeals, presenting one issue, which we restate as whether the trial court erred in concluding

that forfeiture of Timbs's vehicle would constitute a constitutionally excessive fine.

[2] We affirm.

Facts and Procedural History

[3] In January 2013, Timbs purchased a Land Rover LR2 ("Land Rover") for the sum of $42,058.30 from a dealer in Indianapolis. Timbs paid for the Land Rover with life insurance policy proceeds that he received following the death of his father. Thereafter, Timbs began to use this vehicle to drive from Marion, Indiana to Richmond, Indiana for the purposes of purchasing heroin. Timbs also used the Land Rover to transport the heroin back to Richmond.

[4] In May 2013, a confidential informant ("CI") told a member of the Joint Effort Against Narcotics ("JEAN") team[1] that he could purchase heroin from Timbs. The police then set up a controlled buy, and on May 6, 2013, an undercover detective and the CI met Timbs at an apartment.[2] The detective gave the CI the purchase money, and the CI went inside the apartment with Timbs and returned with two grams of heroin that he had purchased for the previously agreed-to price of $275.

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[1] The JEAN team is composed of members from the Grant County Sheriff's Department, the Grant County Prosecutor's Office, and the Marion Police Department.

[2] This apartment was apparently not Timbs's residence. *See* Tr. pp. 27-28.

[5] The police set up another controlled buy on May 22, 2013, to take place at a local gas station. This time, the undercover detective purchased two grams of heroin from Timbs for a price of $260. After this transaction, the detective spoke with Timbs about arranging yet another purchase of heroin. However, on the day this controlled buy was set to take place, the police instead apprehended Timbs during a traffic stop.

[6] On June 5, 2013, the State charged Timbs with two counts of Class B felony dealing in a controlled substance and one count of Class D felony conspiracy to commit theft. On August 5, 2013, the State filed a complaint for forfeiture, seeking to obtain Timbs's Land Rover.

[7] On April 12, 2015, Timbs entered into a plea agreement with the State whereby he agreed to plead guilty to one count of Class B felony dealing in a controlled substance and Class D felony theft in exchange for the State dismissing the remaining charges. The following day, the trial court accepted the plea and sentenced Timbs pursuant to the agreement to six years, with one year executed in community corrections and five years suspended to probation. Pursuant to the plea agreement, Timbs also agreed to reimburse the JEAN team $385 for the cost of the investigation and pay a drug abuse, prosecution, and interdiction fee of $200; court costs of $168; a bond fee of $50; and a $400 certified court program fee after undergoing a drug and alcohol assessment with the probation department. The complaint for forfeiture remained pending.

[8] On July 15, 2015, the trial court held a hearing on the forfeiture complaint. At the hearing, Timbs argued that forfeiture of his Land Rover, which he claimed was worth over $40,000, constituted an excessive fine, given that he had only dealt drugs twice, that he was only convicted for one count of dealing, and that the maximum statutory fine for his crime was $10,000. The trial court took the matter under advisement and, on August 28, 2015, entered an order in favor of Timbs, which provided in relevant part:

> 7. The State now seeks a judgment against the Defendant for forfeiture of the Land Rover; a vehicle that just five (5) months before it was seized had a fair market value of almost four (4) times the maximum monetary fine of $10,000.
>
> 8. The Court finds that the judgment of forfeiture sought by the State violates the Excessive Fines Clause of the Eighth Amendment of the United States Constitution. The amount of the forfeiture sought is excessive and is grossly disproportional to the gravity of the Defendant's offense.
>
> 9. While the negative impact on our society of trafficking in illegal drugs is substantial, a forfeiture of approximately four (4) times the maximum monetary fine is disproportional to the Defendant's illegal conduct.
>
> Judgment is entered in favor of the Defendant and against the State. The Land Rover LR2, at issue, is ordered released to the Defendant immediately.

Appellant's App. pp. 15-16. The State filed a motion to correct error on September 14, 2015, claiming for the first time that the trial court should have ordered a sale of the Land Rover from which a non-excessive fine could be deducted.[3] The trial court held a hearing on the State's motion to correct error on October 14, 2015, and entered an order denying the State's motion on October 21, 2015. The State now appeals.

Standard of Review

[9] At trial, the State bore the burden of establishing the requirements of forfeiture. *See* Ind. Code § 34-24-1-4(a). Thus, the State is appealing from a negative judgment. *See Merrillville 2548, Inc. v. BMO Harris Bank N.A.*, 39 N.E.3d 382, 390-91 (Ind. Ct. App. 2015), *reh'g denied*, *trans. denied*. On appeal, we will not reverse a negative judgment unless it is contrary to law. *Id.* Here, the State argues that the trial court erred in determining that the forfeiture of the Land Rover constituted an excessive fine. This court has held that forfeitures are subject to the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. *$100 and a Black Cadillac v. State*, 822 N.E.2d 1001, 1011 (Ind. Ct. App. 2005), *trans. denied* (citing *Austin v. United States*, 509 U.S. 602, 609-10 (1993)).[4]

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[3] The State does not reiterate this claim on appeal, and even if it did, it is well settled that an issue may not be presented for the first time in a motion to correct error. *Van Winkle v. Nash*, 761 N.E.2d 856, 859 (Ind. Ct. App. 2002).

[4] The State claims that there is a question as to whether the Excessive Fines Clause of the Eighth Amendment is applicable to

We review the trial court's conclusion regarding the excessiveness of a fine *de novo*. *United States v. Bajakajian*, 524 U.S. 321, 336 (1998).

Discussion and Decision

> In rem forfeiture is an ancient concept under which courts obtained jurisdiction over property when it was virtually impossible to seek justice against property owners guilty of violating maritime law because they were overseas. Civil forfeiture traces to ancient Roman and medieval English law; both made objects used to violate the law subject to forfeiture to the sovereign. Civil forfeiture is no longer tethered to difficulties in obtaining personal jurisdiction over an individual. It now serves as one of the most potent weapons in the judicial armamentarium[.] Civil forfeiture is a leading method for imposing economic sanctions against narcotics traffickers.

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the states via the Fourteenth Amendment. The United States Supreme Court has yet to hold that the Excessive Fines Clause is applicable to the States. *See Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) ("We shall not decide whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment."). But this court held in *$100 and a Black Cadillac* that the Excessive Fines Clause did apply to Indiana's forfeiture statutes. 822 N.E.2d at 1011. We see no reason to disagree with our prior opinion. We also note that the Indiana Constitution contains its own provision against excessive fines. *See* Ind. Const. art. 1, sec. 16 ("Excessive fines shall not be imposed). Because neither side addresses the Indiana Constitution, we base our opinion on the federal Excessive Fines Clause.

> Today, all states have statutory provisions for some form of asset forfeiture, and there are more than four hundred federal forfeiture statutes relating to various federal crimes. An important feature of many of these statutes is characterization of the process as civil forfeiture under which (by contrast to criminal forfeiture) a property owner need not be found guilty of a crime – or even charged – to lose permanently their cash, car, home or other property. The relative ease of effecting such forfeiture and the disposition of the assets have become a matter of public note.

Serrano v. State, 946 N.E.2d 1139, 1141 (Ind. 2011) (citations omitted).

[10] The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. At the time the Constitution was adopted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." ***$100 and a Black Cadillac***, 822 N.E.2d at 1011 (quoting *Bajakajian*, 524 U.S. at 327). Accordingly, the Excessive Fines clause of the Eighth Amendment "limits the government's power to extract payments, *whether in cash or in kind*, as punishment for some offense." *Id.* (quoting *Bajakajian*, 524 U.S. at 328) (emphasis added) (internal quotation marks omitted). As noted above, this court has already held that forfeitures in Indiana are subject to the Excessive Fines Clause. *Id.* (citing *Austin*, 509 U.S. at 622).

[11] To determine whether a fine or forfeiture is "excessive," for purposes of the Excessive Fines Clause, we consider whether the amount of the forfeiture bears "some relationship to the gravity of the offense that it is designed to punish." *Id.* (quoting *Bajakajian*, 524 U.S. at 334). A punitive forfeiture violates the Excessive Fines Clause "if it is grossly disproportional to the gravity of a defendant's offense." *Id.* (quoting *Bajakajian*, 524 U.S. at 334).[5]

[12] Here, there is no question that the nature of Timbs's offense was serious. He committed a Class B felony. However, our General Assembly has determined that a Class B felony should be punishable by a maximum fine of $10,000. Here, the evidence before the trial court was that Timbs's vehicle was worth approximately *four times* the amount of the maximum fine. Although we do not suggest that forfeiture of any asset valued over the maximum fine is automatically a violation of the Excessive Fines Clause, it is instructive to our analysis that the value of the asset sought by the State is well in excess of the maximum fine. Moreover, it is undisputed that the Land Rover was not purchased with the proceeds of any criminal behavior; it was purchased with life insurance proceeds.

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[5] The State claims that the Supreme Court in *Bajakajian* "allow[ed] a forfeiture three times the applicable fine" of $5,000. This is incorrect. The Supreme Court was abundantly clear that the only question before it was whether forfeiture of the *entire* amount of cash at issue, $357,144, was proper. *See Bajakajian*, 524 U.S. at 339 n.11.

[13] The State notes that an asset may be forfeited even if the State does not convict the owner of the criminal charge. *See Katner v. State*, 655 N.E.2d 345, 348 (Ind. 1995) (noting that a conviction on the underlying criminal activity is not a prerequisite for forfeiture). Thus, the State argues, it could have sought forfeiture of the Land Rover even if Timbs had not been convicted. However, this does not negate the fact that our General Assembly has set the maximum fine for the crime for which Timbs was convicted at $10,000, whereas the value of the Land Rover was upwards of $40,000.

[14] We also note that financial burdens had already been imposed on Timbs when he pleaded guilty. Pursuant to his plea agreement, Timbs agreed to reimburse the JEAN team $385 for the cost of the investigation and pay a drug abuse, prosecution, and interdiction fee of $200; court costs of $168; a bond fee of $50; and a $400 certified court program fee. Notably, the trial court imposing the sentence found no need to impose *any* fine, much less the maximum fine of $10,000.

[15] The State also argues that the evidence before the trial court was that Timbs committed criminal acts other than the one for which he was convicted. This may be true. However, the complaint for forfeiture referred only to May 31, 2013.[6] If the State wished to

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[6] The complaint set forth in relevant part:

1. On or about May 31, 2013, officers of the Plaintiff, J.E.A.N. Team Drug Task Force, seized from the Defendant, TYSON TIMBS, One (1) 2012 Land Rover LR2 . . . in Grant County, Indiana.

seek forfeiture of the Land Rover based on Timbs's other criminal acts, it should have done so more clearly in its forfeiture complaint. Moreover, even considering these other acts, we note that the only evidence before the trial court was that Timbs sold heroin twice, both times as a result of controlled buys. The remaining times he transported heroin, it was apparently for his own use. The trial court was free to consider these circumstances in making its determination.

[16] We also find the State's citation to *United States v. Aleff*, 772 F.3d 508 (8th Cir. 2014), to be unpersuasive. In *Aleff*, the defendants were convicted of conspiracy to defraud the federal government and ordered to pay almost $304,000 in restitution. Thereafter, the federal government brought suit against the defendants under the False Claims Act, and the District Court

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> 2. On said date and at said place, the Defendant, TYSON TIMBS, had in his possession, the above described vehicle, said vehicle had been furnished or intended to be furnished by Defendant, TYSON TIMBS, in exchange for an act that is in violation of a criminal statute, or used to facilitate any violation of a criminal statute or is traceable as proceeds of the violation of a criminal statute under Indiana Law, as provided in I.C. 34-24-1-1.
>
> 3. The Defendant, TYSON TIMBS, is the owner of the vehicle.
>
> WHEREFORE, the Plaintiffs demand judgment against the Defendant for forfeiture of vehicle, for the delivery of said vehicle upon forfeiture as provided for in I.C. 34-24-1-1, for reimbursement of law enforcement costs as provided by statute, and for all other relief just and proper in the premises.

Appellant's App. p. 14.

awarded the government treble damages and statutory penalties of over $1,300,000. On appeal, the Eighth Circuit Court of Appeals held that this was not grossly disproportionate under the Excessive Fines Clause. *Aleff*, 772 F.3d at 512-13. In so holding, the court noted that the defendants' scheme to defraud the government was extensive and took more than six years. *Id.* at 513. The defendants "received $303,890 from the public fisc to which they were not entitled," and the government "suffered damage to the integrity of one of its programs." *Id.* More importantly, the damages recovered by the government were within the limits of damages allowed by the False Claims Act. *Id.*

[17] The present case is readily distinguishable from *Aleff*. Timbs did not engage in a years-long scheme to defraud the State, nor did the State here seek to recover treble damages under a false claims statute. It instead sought to forfeit a vehicle that was not purchased with the proceeds of Timbs's crimes. Here, the value of the asset subject to potential forfeiture was well over the statutory maximum fine, whereas in *Aleff*, the damages were more than the actual damages but still within the statutory maximum allowed under the False Claims Act.[7]

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[7] The same holds true for the State's citation to *United States v. Mackby*, 339 F.3d 1013 (9th Cir. 2003), which was also brought under the False Claims Act. The total damages awarded in that case were within the statutory limits and the government was directly defrauded. *Id.* at 1018. Although the amount awarded, $729,455, was much greater than the $58,151 sought by the

Conclusion

[18] Forfeiture of the Land Rover, which was worth approximately four times the maximum permissible statutory fine, was grossly disproportionate to the gravity of Timbs's offense. We therefore affirm the trial court's conclusion that forfeiture of the Land Rover violated the Excessive Fines Clause of the Eighth Amendment.

[19] Affirmed.

Vaidik, C.J., concurs.

Barnes, J., dissents with opinion.

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government, the defendants had filed fraudulent Medicare claims for which they received payment of $331,078. *Id.*

IN THE
COURT OF APPEALS OF INDIANA

State of Indiana, *Appellant-Plaintiff*, v. Tyson Timbs and a 2012 Land Rover LR2, *Appellees-Defendants.*	Court of Appeals Case No. 27A04-1511-MI-1976

Barnes, Judge, dissenting.

[20] I respectfully dissent. I realize that my colleagues point to the allegedly "disproportionate" nature of the forfeiture sought by the State here. I understand their concern. I would simply say as follows:

[21] Forfeitures are constitutional and, although some have been found to be excessive, are a useful law enforcement tool. *See U.S. v. Ursery*, 518 U.S. 267, 290, 116 S. Ct. 2135, 2148 (1996).

[22] We have ruled that, in limited situations, the Excessive Fines Clause of the Eighth Amendment may come into play in a forfeiture case. *See $100 and a Black Cadillac*, 822 N.E.2d at 1011-12.

[23] However, it is clear and without conflict in the evidence that the vehicle here was Timbs's and was used to facilitate crime, i.e., to transport Timbs to the place of an arranged heroin buy. The vehicle did not

have only a tangential relationship to the crime or to the defendant. It should not matter that Timbs committed the crime using an expensive new Land Rover rather than an old, inexpensive "beater."

[24] The majority correctly points out that the record reflects Timbs "only" sold heroin twice. I simply posit that Timbs was arrested before the third buy could take place, and we are left to wonder how much heroin he had access to.

[25] I am keenly aware of the overreach some law enforcement agencies have exercised in some of these cases. Entire family farms are sometimes forfeited based on one family member's conduct, or exorbitant amounts of money are seized. However, it seems to me that one who deals heroin, and there is no doubt from the record we are talking about a dealer, must and should suffer the legal consequences to which he exposes himself.

[26] Timbs dealt heroin and got caught. I vote to reverse the trial court's denial of the State's forfeiture request.

STATE OF INDIANA
IN THE GRANT SUPERIOR COURT 1
COUNTY OF GRANT, SS:
2015 TERM

CAUSE NO. 27D01-1308-MI-92

STATE OF INDIANA, and the
J.E.A.N. Team Drug Task Force,
Marion Police Department, and
Grant County Sheriff's
Department,

Plaintiffs

vs

TYSON TIMBS,
One (1) 2012 Land Rover LR2
VIN#SALFR2BG7DH322169,

Defendants

FILED
AUG 28 2015
/s/ Carolyn J. Mowery
CLERK GSC 1

JUDGMENT ORDER

The State appears by counsel, Joshua N. Taylor, and the Defendant appears in person and by counsel, Todd Glickfield, for a hearing on the State's Complaint for Forfeiture filed on August 5th, 2013. Evidence and argument are submitted to the Court and concluded. Having taken this matter under advisement the Court now finds and orders as follows:

1. On or about January 30th, 2013, the Defendant purchased a 2013 Land Rover LR2 vehicle from Tom Wood Jaguar-Volvo in Indianapolis for the sum of $42,058.30.

At the time of purchase, the Land Rover odometer read 1,237 miles.

2. The uncontroverted evidence demonstrated that the Defendant paid for the Land Rover, in full, with life Insurance proceeds he received following his father's death.

3. Between the date of purchase, and May 31st, 2013, the Defendant drove the vehicle frequently from Marion to Richmond to purchase heroin. The Land Rover was used by the Defendant to transport the heroin back to Marion. The Defendant both used and sold the heroin. When the Land Rover was seized by the State at the end of May 2013, the odometer reading was between 17,000 and 18,000 miles. The increased mileage primarily resulted from the Defendant traveling between Marion and Richmond to engage in illegal drug trafficking..

4. On June 5th, 2013, the Defendant was charged in Grant Superior Court II under cause number 27D02-1306-FB-46 with two (2) counts of Dealing in a Schedule I Controlled Substance, Class B felonies, and one count of Conspiracy to Commit Theft, a Class D felony. Ultimately, the Defendant plead guilty to one (1) count of Dealing in a Schedule I Controlled Substance, and Theft. On April 13th, 2015, pursuant to a written plea agreement, the Defendant was sentenced to an aggregate

term of six (6) years at the Indiana Department of Corrections with one (1) year executed and five (5) years suspended and served on formal, supervised probation. The executed portion of the Defendants sentence is being served on home detention through the Grant County Community Corrections Home Detention Program.

5. As part of the plea agreement entered into by the Defendant, he is ordered to reimburse the J.E.A.N Team Drug Task Force $385.00 for costs of investigation; pay a drug abuse, prosecution, and interdiction fee of $200.00; pay court costs of $168.00; and pay a bond fee of $50.00. Finally, the Defendant is ordered to undergo a drug and alcohol assessment and follow through with recommended treatment, and pay a $400.00 Certified Court Program fee to the Grant County Probation Department.

6. The maximum fine for a Class B felony was $10,000.00 on the date of the Defendant's arrest in 2013.

7. The state now seeks a judgment against the Defendant for forfeiture of the Land Rover; a vehicle that just five (5) months before it was seized had a fair market value of almost four (4) times the maximum monetary fine of $10,000.00.

8. The Court finds that the judgment of forfeiture sought by the State violates the

Excessive Fines Clause of the Eighth Amendment of the United States Constitution. The amount of the forfeiture sought is excessive, and is grossly disproportional to the gravity of the Defendant's offense.

9. While the negative impact on our society of trafficking in illegal drugs is substantial, a forfeiture of approximately four (4) times the maximum monetary fine is disproportional to the Defendant's illegal conduct.

10. Judgment is entered in favor of the Defendant and against the State. The Land Rover LR2, at issue, is ordered released to the Defendant immediately.

Dated this 28th day of August, 2015.

/s/ Jeffrey D. Todd
Jeffrey D. Todd, Judge
Grant Superior Court No. 1

STATE OF INDIANA
IN THE GRANT SUPERIOR COURT 1
COUNTY OF GRANT, SS:
2015 TERM

CAUSE NO. 27D01-1308-MI-92

STATE OF INDIANA, and the
J.E.A.N. Team Drug Task Force,
Marion Police Department, and
Grant County Sheriff's
Department,

Plaintiffs

vs

TYSON TIMBS,
One (1) 2012 Land Rover LR2
VIN#SALFR2BG7DH322169,

Defendant

FILED

OCT 21 2015

/s/ Carolyn J. Mowery
CLERK GSC 1

ORDER

The parties appear in person and by counsel for a hearing on the Plaintiff's Motion to Correct Error filed on September 14th, 2015. Arguments are submitted to the Court and concluded. Having taken this matter under advisement, the Court now denies the Plaintiff's Motion to Correct Error in all respects.

Dated this 21st day of October, 2015.

/s/ Jeffrey D. Todd
Jeffrey D. Todd, Judge
Grant Superior Court No. 1

STATE OF INDIANA
IN THE GRANT SUPERIOR COURT
COUNTY OF GRANT
2017 TERM

CAUSE NUMBER: 27D01-1308-MI-92

STATE OF INDIANA, and the
J.E.A.N. Team Drug Task Force,
Marion Police Department, and
Grant County Sheriff's Department,

Plaintiffs

vs

TYSON TIMBS, One (1) 2012
Land Rover LR2
VIN#SALFR2BG7DH322169,

Defendant

ORDER OF JUDGMENT

Pursuant to the Indiana Supreme Court's opinion issued on November 2, 2017, judgment is entered in favor of Plaintiffs and against the Defendant for forfeiture of one (1) 2012 Land Rover LR2 VIN#SALFR2BG7DH322169.

SO ORDERED, this 9 day of November, 2017.

/s/ Jeffrey D. Todd
JEFFREY D. TODD, JUDGE
GRANT SUPERIOR COURT 1

STATE OF INDIANA)	IN THE GRANT COUNTY
) ss:	SUPERIOR COURT 1
COUNTY OF GRANT)	CAUSE NO. 27D01-1308-MI-92

STATE OF INDIANA, and the J.E.A.N. Team Drug Task Force, Marion Police Department, and Grant County Sheriff's Department,

Plaintiffs,

vs.

TYSOM TIMBS, and One (1) 2012 Land Rover LR2 VIN#SALFR2BG7DH322169,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO WITHDRAW ORDER OF JUDGMENT AND SUSPEND PROCEEDINGS PENDING APPEAL TO THE UNITED STATES SUPREME COURT

The Court, having considered Defendants' Motion to Withdraw Order of Judgment and Suspend Proceedings Pending Appeal to the United States Supreme Court and all related filings and being duly advised, now GRANTS said motion. Accordingly, the Court WITHDRAWS its prior Order of Judgment dated November 9, 2017. Further proceedings are hereby STAYED pending the resolution of all appeals.

SO ORDERED, this 15 day of November, 2017.

/s/ Jeffrey D. Todd
JEFFREY D. TODD, JUDGE
GRANT SUPERIOR COURT 1

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